No. 14502

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Butchers Union Local No. 563, Affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor,

Appellant,

vs.

Commercial Packing Company, Inc.,

Appellee.

APPELLANT'S OPENING BRIEF.

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Commercial Packing Company, Inc.,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction and Facts.

This is an appeal from a decision of the Honorable Ernest A. Tolin, United States District Judge, denying the motion of the appellant for a stay of all proceedings, pending arbitration, as provided by Section 3 of Title 9 of the United States Code.

Appellee, a meat packing concern, brought suit against the appellant, a labor union representing the Company's employees, pursuant to the provisions of Section 301 of the Labor Management Relations Act of 1947 (Title 29, U. S. C. A., Sec. 185). The Company alleged that the

Union had breached the collective bargaining agreement previously entered into between the Company and the Union by instructing their employees to limit their rate of output, which, it was alleged, had caused substantial losses to the Company [R. 3].

The Union moved to dismiss the action or, in the alternative, to stay all proceedings pending arbitration [R. 23].

The motion to stay all proceedings pending arbitration was expressly submitted, pursuant to Title 9 of the United States Code. Section 3 of that title provides for a stay of any suit or proceeding upon an issue which, by terms of written agreement, is referable to arbitration.

The District Court held that the agreement herein involved was within the exception clause of the Arbitration Act, and therefore that the Act was inapplicable to the matter at bar [R. 28].

By an Order dated August 16, 1954, the District Court denied the appellant's motion to stay proceedings pending arbitration [R. 29].

Notice of appeal was filed by the appellant on August 23, 1954 [R. 30].

This Court's jurisdiction to review is not questioned.

ARGUMENT.

POINT I.

The Order of the District Court Denying the Motion to Stay All Proceedings Pending Arbitration Is an Appealable Order.

The order is an appealable interlocutory order within the provisions of 28 U. S. C. A., Sec. 1292.

Shanferoke Coal and Supply Corp. v. Westchester Service Corp., 293 U. S. 449, 55 S. Ct. 313 (1934);

Gatliff Coal Co. v. Cox, 142 F. 2d 876 (C. C. A. 6th, 1944).

POINT II.

The Motion to Stay All Proceedings Pending Arbitration Was Improperly Denied.

(a) The Collective Agreement Entered Into Between the Parties Not Being a "Contract of Employment," Is Not Excepted From the Applicability of the Arbitration Act.

Section 3 of the United States Arbitration Act (Act, Feb. 12, 1925, c. 213, 43 Stat. 883) permits federal courts to grant stays pending arbitration in suits involving issues made arbitrable under written agreements. The Act sanctions written arbitration agreements and gives federal courts power to compel arbitration under them.

Section 1 of that Act, after defining certain words, states:

> "* * * nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

In denying the motion of the Union to stay all proceedings pending arbitration the Court below held that the agreement here involved was within the exception clause of the Arbitration Act, and therefore, the Act is inapplicable to the matter at bar.

As support for its ruling the Court cited three decisions, as follows: *Gatliff Coal Co. v. Cox,* 142 F. 2d 876 (6th, 1944); *International Union v. Colonial Hardwood Floor Co.,* 168 F. 2d 33 (4th, 1948); *Mercury Oil Refining Co. v. Oil Workers International Union, C. I. O.,* 187 F. 2d 980 (10th, 1951).

The leading case on the point is the *Gatliff* case, *supra*; in that case, an individual employee sued for wages due him under a collective bargaining agreement, the employer moved to stay the action pending arbitration under the contract. The trial court refused the stay, and the Sixth Circuit concurred on the ground that the Act did not apply to "contracts of employment."

It is to be noted, however, that the Court did not say that a collective bargaining agreement is "a contract of employment." It is as the unfortunate result of later decisions by other courts which misconstrued the *Gatliff* opinion and treated that decision as though it had said that collective agreements were "contracts of employment." that we are now confronted with the issue in the instant case.

Thus, in *International Union v. Colonial Hardwood Flooring Company,* 168 F. 2d 33 (C. C. A. 4, 1948), the Court denied the defendant's motion for a stay of proceedings pending arbitration, citing *Gatliff.* A reading of the *Colonial* opinion indicates that the Court did not consider at length the question of the distinction between "con-

tracts of employment" as used in the Arbitration Act and a collective bargaining agreement. In any event, the Court found that the arbitration clause in the agreement in that case had relation to controversies which were made the subject of grievance procedure and not to claims for damages on account of strikes or secondary boycotts. In the *Colonial* case the plaintiff had sued to recover damages on account of a strike in violation of the provisions of the contract, and a secondary boycott. On the facts, the holding in *Colonial,* therefore, was correct.

The third case cited by the District Court below, *Mercury Oil Refining Co. v. Oil Workers International Union, C. I. O., supra,* did not discuss the question at all. It merely cited the *Gatliff* and *Colonial* cases, stating that:

> "Labor contracts are specifically excluded from the Federal Arbitration Act."

However, the Sixth Circuit, in the recent case of *Hoover Motor Express Company, Inc. v. Teamsters, et al.,* 217 F. 2d 49 (1954), has now clarified its earlier language in *Gatliff* and has held that the exclusion clause of Section 1 of the Arbitration Act does not apply to a collective bargaining contract, which it found to be a trade agreement rather than a "contract of employment" within the meaning of the statutory exclusion clause which excludes "contracts of employment."

The Court there said:

> "While the Gatliff case has been cited by other courts (*Cf.,* Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Pennsylvania Greyhound Lines, Inc., 192 F. 2d 310 (C. A. 3), and International Union United Furniture Workers v. Colonial Flooring Co., Inc., 168 F. 2d

33 (C. A. 4)), for the proposition that a collective bargaining agreement is a contract of employment, we think these misconstrue the Gatliff holding, which on its facts simply supports the doctrine that an individual hiring for wages falls within the exception."

That a collective bargaining agreement is a trade agreement and not a contract of employment is not a proposition new to the law. In *J. I. Case Co. v. National Labor Relations Board,* 321 U. S. 332, the very issue was there decided, the Court stating:

"The agreement in question is a collective labor agreement, and, as such, is not a 'contract of employment.'

'Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. * * * After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. * * *.' "

And, in the *Hoover* case, *supra,* the Court said:

"The exception in Section 1 of the Arbitration Act we think was intended to avoid the specific performance of contracts for personal services and not to apply to collective labor agreements. Lewittes &

Sons v. United Furniture Workers of America, 95 Fed. Supp. 851, 855, 27 LRRM 2490. The hiring of the individual workmen who are employed in accordance with the collective trade agreement is the contract of employment. United Office & Professional Workers of America v. Monumental Life Insurance Co., 88 Fed. Supp. 602, 13 L. A. 1007. *Cf.*, J. I. Case Co. v. N. L. R B, *supra,* 334; Lewittes & Sons v. United Furniture Workers of America, *supra.*"

Similarly, in the case of *Lewittes & Sons v. United Furniture Workers of America, C. I. O.,* 95 Fed. Supp. 851 (D. C. S. N. Y., 1951), the Court said:

"The exception in Section 1 was intended to avoid the specific performance of contracts for personal services in accordance with the traditional judicial reluctance to direct the enforcement of such contracts and it was not intended to apply to collective labor agreements. United Office & Professional Workers of America, C. I. O. v. Monumental Life Insurance Company, 88 Fed. Supp. 602.

"The purpose of the Labor-Management Relations Act of 1947, 29 U. S. C. A. 141 *et seq.,* is to bring about peaceful solutions of labor disputes without recourse to industrial strife. Where the parties manifest a purpose to dispose of their disputes by arbitration rather than resort to the use of economic force or pressures, their agreements should be liberally construed with a view toward the encouragement of arbitration. Kulukundis Shipping Co. v. Amtorg Trading Corp. [126 F. 2d 978].

"The Courts should be reluctant 'to strike down a clause which appears to promote peaceful labor relations rather than otherwise.' Shirley-Herman

Co. v. International Hod Carriers [182 F. 2d 806]. The granting of a stay through the interpretation here placed upon the Arbitration Act is in accordance with these policies."

(b) The Employees in the Instant Case Are Not "a Class of Workers Engaged in Interstate Commerce" Within the Meaning of the Exception Clause of the Arbitration Act.

The question here was squarely presented and decided for the first time in *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America (U. E.) Local 437,* 207 F. 2d 450 (C. A. 3, 1953), where that Court, speaking through Judge Maris, said:

> "We think that the intent of the latter language was, under the rule of *ejusdem generis,* to include only those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it. The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers."

It is significant that the Arbitration Act does not use terms such as "affecting commerce" (Taft-Hartley Act), or "in the production of goods for commerce" (Fair Labor Standards Act).

In this case the appellee's employees are engaged in the production of goods for subsequent sale in interstate commerce. Thus, while their activities will undoubtedly affect interstate commerce, they are not acting directly

in the channels of commerce itself. They are, therefore, not a "class of workers engaged in foreign or interstate commerce" within the meaning of Section 1 of Title 9.

To the same effect:

> *Harris Hub & Spring Co. v. U. E.,* 121 Fed. Supp. 40 (1954).

Although the Third Circuit had previously been of the view that collective agreements were to be viewed as "contracts of employment" and therefore excluded from the scope of the Arbitration Act (*Amalgamated Association of Street Electric Railway Workers v. Pennsylvania Greyhound Lines, Inc.,* 192 F. 2d 310), the effect of its recent *Tenney* decision has been to restrict the significance of its former position. However, in the *Tenney* case, Chief Judge Biggs, in writing the opinion of the concurring Judges, stated:

> "This Court should expressly overrule its decision . . . holding that a collective bargaining agreement is a 'contract of employment' within the purview of Section 1 of the Act . . . Judge Maris (who wrote the majority opinion) has authorized me to say that he agrees with me that a collective bargaining agreement is not a 'contract of employment' . . . properly interpreted."

(c) The Statute Is Plain and Unambiguous.

To reject literal interpretation of statutory language, there must be something to make plain the intent of the Legislature that the letter of the statute is not to prevail.

> *De Ruiz v. De Ruiz,* 88 F. 2d 752.

The proponents of the view that the Arbitration Act was not designed to include collective agreements within

its scope base their argument upon an alleged intent of Congress to make the Act applicable only to instances of commercial arbitration.

In discussing the legislative history of the Arbitration Act the Court, in the *Tenney* case, *supra,* at page 452, noted that:

> "The only reference to the clause in question appears in a report of the Bar Association committee in which it was stated:
>
> " 'Objections to the bill were urged by Mr. Andrew Furseth as representing the Seamen's Union, Mr. Furseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." ' "

Discussing the sparse legislative history the Court concluded that:

> "The legislative history furnishes little light on this point."

And Chief Judge Biggs, in a concurring opinion stated at page 455 that:

> "I cannot accept the plaintiff's contention that the legislative history of the Act compels the conclusion that the Act was intended to apply to commercial disputes and not to labor disputes. The legislative history is of a kind that possesses little weight and should not be considered. *Duplex Printing Press Co. v. Deering* (1921), 254 U. S. 443, 474, 41 S. Ct. 172, 65 L. Ed. 349, and *United States v. King Chen*

> *Fur Co.* (1951), 188 F. 2d 577, 584, 38 Cust. & Pat. App. 107. The face of the statute must control the relief to be granted under it."

Substantially the same question was presented to the California Supreme Court in *Levy v. Superior Court,* 15 Cal. 2d 692 (1940). In that case it was held that a collective bargaining agreement was not excepted from the provisions of the California Arbitration Law (Code Civ. Proc., Secs. 1280-1293), the Court holding that a collective agreement was not a contract "pertaining to labor" within the meaning of the provisions of Section 1280 of the Code of Civil Procedure. The Court pointed out that:

> "The respondents present no legislative history which indicates that the proviso was inserted in Section 1280 for the purpose of excluding collective bargaining contracts. The bill introducing the measure without the proviso was before the Assembly in January, 1927, designated as Assembly Bill No. 460. The proviso was inserted by amendment in the committee on March 1, 1927. It is asserted that in the movement for uniform state legislation on arbitration, both commercial and industrial, a form of State Arbitration Act contained the proviso that 'the provisions of this Act shall not apply to collective contracts between employers and employees, or between employers and associations of employees, in respect to terms or conditions of employment,' and that such a draft was tendered to the California legislature in 1927. It is stated that such a provision has been included in the statutes of Arizona, New Hampshire, Rhode Island and Oregon. The respondents argue that by the omission of such specific provision from the California statute and the use of the proviso excluding contracts 'pertaining to

> labor,' the legislature intended also to exclude collective bargaining contracts. But it would seem more reasonable to expect a specific provision to that effect if the legislature intended to exclude collective bargaining contracts from the operation of the statute."

As was pointed out by the California Court in the *Levy* case, would it not have seemed more reasonable to expect a specific provision to that effect if the Congress had intended to exclude collective bargaining contracts from the operation of the Federal Arbitration Act?

Conclusion.

We feel that the weight of authority indicates that the collective bargaining agreement is not excluded from the provisions of the Arbitration Act.

In the instant matter before the Court there is no claim that there was a strike or a work stoppage. The only claim made is that the Union instructed and urged the employees to control the work load, still continuing to do the regular work.

We, therefore, have a situation where employee members of the Union are abiding by the Contract and are performing their labor; the only issue being that Appellee claims that they should do more work.

This is precisely the situation that calls for Arbitration.

Respectfully submitted,
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